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RECEIVED

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Department of Water Resources
Southern Region

February 19, 2003

Wood River Land Trust
Attn: Stephen Frenzl & Scott Boettger
P.O. Box 6376
Ketchum, ID 83340

Bureau of Land Management
Attn: Bill Baker, Field Manager
400 West F. Street
Shoshone, ID 83352

Allen D. Merritt, P.E., Manager
Southern Regional Office
Idaho Dept. of Water Resources
1341 Fillmore St., Ste. 200
Twin Falls, ID 83301-3380

Norm Young
State Office
Idaho Dept. of Water Resources
1301 N. Orchard - P.O. Box 83720
Boise, ID 83720

Bruce Lium
American Water Resources Co.
P.O. Box 1979
Hailey, ID 83333

Greg Martinez
Army Corps of Engineers
304 N. 8th St., Rm 140
Boise, ID 83702

Mayor Dave Wilson
City of Sun Valley
P.O. Box 416
Sun Valley, ID 83353

**Re: Elkhorn Pond and Stream Project
IDWR Permit No. 37-S-1120A**

Gentlemen:

I represent the Lane Ranch Homeowners Association, and in that capacity have been asked to correspond with you about concerns my client has with the project the Wood River Land Trust completed in 2001, which is euphemistically referred to as "Elkhorn Creek Restoration Project".

As I understand the project, the long-established diversion ditch delivering Lane Ranch water rights from a pond near the Sunrise Subdivision in the city of Sun Valley was changed by the advent of

two alterations to that delivery system:

1. The pond near the Sunrise Subdivision was reconfigured, changing its shape and depth, and providing an outflow through an existing berm to allow high flows to escape the pond into a newly created wetland area. I believe this work was done on property owned by the Bureau of Land Management.
2. Some distance downstream from that pond, on lands belonging either to BLM or the City of Sun Valley, the project included the placement of a new diversion structure to divert certain high flows or floodwater out of the existing ditch delivering water to the Lane Ranch into a meandering channel running parallel to, and south of, the long-established ditch conveying water to the Lane Ranch. The meandering course is something which the project sponsors have identified as the "Old Elkhorn Stream Course".

In addition, increased beaver activity has been promoted throughout the project

Governmental agency approval for this two-phased project is apparently limited to two joint permits issued pursuant to the Rivers and Harbors Act of 1989, § 404 of the Clean Water Act, and under the Stream Channel Protection Act of the State of Idaho, issued by the Idaho Department of Water Resources. The Wood River Land Trust completed two joint applications for the permits dated April 26, 2000, which were evidently issued by the Idaho Department of Water Resources on behalf of itself and the U.S. Corps of Engineers. I found no indication that either the Wood River Land Trust or the owners of the respective land on which the project was completed hold any water right for the aesthetic or recreational uses, or minimal flows to which the water from the two diversions described above is being applied. I find this curious since a number of years ago Mr. Tom Hormel was required to obtain a water right for a similar wetland at the lower end of Elkhorn Creek near its confluence with the Big Wood River, and I have had several clients that were required to obtain water rights for aesthetic ponds even when located within an irrigation ditch conveying water to other parties or entities. Further, the uses to which this project has ostensibly put the water, such as protection of fish and wildlife, aquatic life, recreation, aesthetic beauty and water quality, are recognized in the State Water Plan as "beneficial uses" for which appropriation must be authorized through the permitting process. It is my opinion that the Wood River Land Trust is diverting and using water without any recognized right or permit from the Idaho Department of Water Resources, in derogation of the water rights held by Lane Ranch Homeowners Association, Inc. Such an approach has left my client without the due process right of reviewing, and, if necessary, protesting a properly filed permit application.

With respect to the joint application for permits issued by the Idaho Department of Water Resources on behalf of itself and the U.S. Army Corps of Engineers for the project, it should be noted that the applications for those permits was accompanied by a letter from Scott Boettger, Wood River Land Trust, and Bruce Lium, American Water Resources, to Robert Flowers, U.S. Army Corps of Engineers, and Terry Blau, Idaho Department of Water Resources, which stated, *inter alia*, that "proper measuring devices will be used to insure that the water rights for Lane Ranch will not be

affected" by the project. To date, such measuring devices and data have not been installed or gathered in a manner sufficient to conclusively determine the apparent negative impacts on the Lane Ranch water rights. I have discussed this issue at great length with Charles E. Brockway, Ph.D., P.E., of Brockway Engineering, who concurs that insufficient data exists on which to base a complete opinion on this matter. Some measurements were taken on behalf of the project's sponsors by a Mr. Arnie Wetstein, but they were not sufficient, nor were they taken in all the right places to obtain a clear answer on the effects the project may be having on Lane Ranch water rights. At this time, neither Mr. Wetstein, nor anyone else on behalf of the project's sponsors, is conducting or proposing additional measurements. Based upon the data to date, it is our opinion that the project results in the loss of water necessary to fill the valid senior water rights of the Lane Ranch Homeowners Association, Inc., primarily from increased evaporative and seepage losses caused by the newly created wetlands, the beaver activity encouraged by the project, and the meandering new stream course into which a portion of the water from Elkhorn Creek is now being diverted. The project's sponsors seem to believe the seepage losses are recaptured into the Lane Ranch pond system on the northeast end of the Lane Ranch Subdivision. It is Dr. Brockway's opinion, however, that the water table in that reach is too deep to allow such recapture and that the seepage from the project is lost to the Lane Ranch.

Dr. Brockway believes it is incumbent on all parties to obtain additional information on the impacts of this project by gathering a series of water measurements both with and without the project in place. Measurements will be made at the stations utilized by Arnie Wetstein, stations above the project down to a Cippoletti weir at the head of the upper Lane Ranch pond, and a new weir installed at the outlet of that pond. Such evaluation will, of course, require that eventually the stream system must be returned, at least temporarily, to the flow conditions existing prior to the construction of the project. That is the only way to accurately measure the project's impact on existing water rights.

In an effort to work through a number of the problems this project represents to the Lane Ranch Homeowners Association, Inc. in the most amicable and expeditious manner, I am hereby petitioning the Idaho Department of Water Resources for a conference of all interested parties and agencies to determine whether, in fact, this project is properly permitted, and hopefully to determine the best protocol for conclusively ascertaining the negative impacts, if any, it may have on senior downstream water rights. I look forward to your response.

Sincerely,



J EVAN ROBERTSON

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Idaho Statutes

TITLE 36 FISH AND GAME CHAPTER 11

PROTECTION OF ANIMALS AND BIRDS

36-1107. WILD ANIMALS AND BIRDS DAMAGING PROPERTY. Other provisions of this title notwithstanding, any person may control, trap, and/or remove any wild animals or birds or may destroy the houses, dams, or other structures of furbearing animals for the purpose of protecting property from the depredations thereof as hereinafter provided.

The director may delegate any of the authority conferred by this section to any other employee of the department.

(a) Director to Authorize Removal of Wildlife Causing Damage. Except for antelope, elk, deer or moose when any other wildlife, protected by this title, is doing damage to or is destroying any property, including water rights, or is likely to do so, the owner or lessee thereof may make complaint and report the facts to the director or his designee who shall investigate the conditions complained of. In the case of water rights, the director shall request an investigation by the director of the department of water resources of the conditions complained of. The director of the department of water resources shall request a recommendation from the local water master, if any, and upon such examination, shall certify to the director of the department of fish and game whether said wildlife, or houses, dams or other structures erected by said wildlife is injuring or otherwise adversely impacting water rights. If it appears that the complaint is well-founded and the property of such complainant is being or is likely to be damaged or destroyed by any such wildlife protected under this title, the director may:

1. Send a representative onto the premises to control, trap, and/or remove such protected wildlife as will stop the damage to said property. Any animals or birds so taken shall remain the property of the state and shall be turned over to the director.
2. Grant properly safeguarded permission to the complainant to control, trap and/or remove such protected wildlife or to destroy any houses, dams, or other structures erected by said animals or birds. Any protected wildlife so taken shall remain the property of the state and shall be turned over to the director.
3. Whenever deemed to be in the public interest, authorize or cause the removal, modification or destruction of any dam, house, structure or obstruction erected by any furbearing animals. The director shall have authority to enter upon all lands, both public and private, as necessary, to control, trap or remove such animals, or to so remove, modify or destroy such dam, house, structure or obstruction that is injuring or otherwise adversely impacting water rights, or to require the landowner to do so. The director shall make a reasonable effort to contact any private landowner to schedule a date and approximate time for the removal, modification or destruction. No liability whatever shall accrue to the department or the director by reason of any direct or indirect damage arising from such entry upon land, destruction, removal or modification.
4. Issue a permit to any bona fide owner or lessee of property which is being actually and materially damaged by furbearing animals, to trap or kill or to have trapped or killed such animals on his own or leased premises. Such permit may be issued without cost to a landholder applicant and shall designate therein the number of furbearing animals that may be trapped or killed, the name of the person who the landowner

has designated to take such furbearers and the valid trapping license number of the taker. Furbearers so taken shall be the property of the taker. Beaver so taken shall be handled in the manner provided in section 36-1104, Idaho Code. The term "premises" shall be construed to include any irrigation ditch or right-of-way appurtenant to the land for which said permit is issued.

(b) Control of Depredation of Black Bear, Mountain Lion, and Predators. Black bear, mountain lion, and predators may be disposed of by livestock owners, their employees, agents and animal damage control personnel when same are molesting livestock and it shall not be necessary to obtain any permit from the department. Mountain lion so taken shall be reported to the director. Livestock owners may take steps they deem necessary to protect their livestock.

(c) Taking of Muskrats in Irrigation Systems Authorized. Muskrats may be taken at any time in or along the banks of irrigation ditches, canals, reservoirs or dams, by the owners, their employees, or those in charge of said irrigation ditches or canals.

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Available Reference: *Search Instructions*

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